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## Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets

Roy L. Brooks\*

### Introduction

By any measure, Derrick Bell is a man of great distinction.<sup>1</sup> After an illustrious career as a civil rights litigator, he joined the faculty of the Harvard Law School, received tenure, and taught courses on constitutional law for eleven years. Professor Bell has also taught at the University of Washington, Emory University, University of Illinois, and Florida State University. In 1980, the University of Oregon selected him to serve as the dean of its law school. Professor Bell is also the author of a leading text in civil rights law<sup>2</sup> and of numerous highly acclaimed scholarly articles,<sup>3</sup> including the Foreword to the Harvard Law Review's survey of the Supreme Court's 1984 term<sup>4</sup>—one of the most prestigious publications for a constitutional law article.

Professor Bell accepted an invitation to teach Constitutional

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\* J.D., Yale Law School 1975, Professor of Law, University of San Diego Law School. I am indebted to Professor Gerald Torres of the University of Minnesota Law School for his valuable ideas and comments.

1. The following account of the events that transpired at Stanford Law School is based upon an article written by Professor Bell, published in a law student newspaper by the Stanford Law Association. See Derrick Bell, *The Price and Pain of Racial Perspective*, Stan. L. Sch. J. 5 (1986). (A copy of Professor Bell's article is on file with *Law & Inequality: A Journal of Theory and Practice*.) I have also spoken by telephone to several persons about these events, including Professor Gerald Torres of the University of Minnesota Law School and Professor Bell himself, who has returned to Harvard Law School.

2. See *infra* note 28.

3. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980); Derrick Bell, *Humanity in Legal Education*, 59 Or. L. Rev. 243 (1980); Derrick Bell, *A Holiday for Dr. King: the Significance of Symbols in the Black Freedom Struggle*, 17 U.C.D. L. Rev. 433 (1984); Derrick Bell, *An American Fairy Tale: the Income-Related Neutralization of Race Law Precedent*, 18 Suffolk U.L. Rev. 331 (1984); Derrick Bell, *A Hurdle too High: Class-Based Roadblocks to Racial Remediation*, 33 Buffalo L. Rev. 1 (1984); Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. Rev. 385 (1986).

4. Derrick Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4 (1985).

Law at Stanford Law School for the 1986 spring semester. At Stanford, Constitutional Law is a required course for first-year students. Professor Bell used a text co-authored by Stanford professor Paul Brest—a book also used in the other two Constitutional Law sections.

Based on the belief that Professor Bell was placing too much emphasis on issues of race and slavery, a number of white students in Professor Bell's course questioned his competence early in the semester. Even though the text assigned to the class was clear on the importance of race and slavery in the formulation of constitutional doctrine, it did not prevent Professor Bell's students from complaining to other professors about "balance" in Professor Bell's teaching. In response to these complaints, a few faculty members organized a series of "enrichment lectures" to "supplement" Professor Bell's teaching. The lectures were canceled after Stanford's Black law student organization protested. None of the professors participating in the lecture series thought to discuss the matter of "balance" in Professor Bell's teaching of Constitutional Law with Professor Bell. Worse yet, Professor Bell was invited to give one of the lectures, and had agreed to do so, without being informed of the real purpose behind the lecture series. Professor Bell apparently was invited in an attempt to allay any suspicion on the part of either Professor Bell or the law school community.

The reaction of the white law professors to the student complaints about Professor Bell's teaching was a radical departure from the manner in which law students' complaints about teaching are routinely handled.<sup>5</sup> More importantly, the reaction by Professor Bell's colleagues, as well as the response of disgruntled students to Professor Bell's teaching, illustrates a particular type of racial perception. I call this racial state of mind an "anti-minority mindset."

By "anti-minority mindset" I mean a predisposition to assess minority performance in a negative or hypercritical fashion, an intolerance for even small mistakes committed by minorities, a proclivity toward denying minorities the deference or presumption of competence normally accorded to white male law professors. An anti-minority mindset, in short, is a set of negative biases held

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5. Especially in first-year courses—when the use of casebooks, Socratic teaching styles, and pressures to excel at times make it difficult to adjust to the study of law—the usual practice is to urge disgruntled students to be patient or to talk the matter over with the professor teaching the course. In Professor Bell's case, the latter approach would not have been a problem because Professor Bell enjoys a reputation of being accessible to students.

against minorities either consciously or unconsciously.<sup>6</sup>

Recent studies show that something more than an anti-minority, as well as an "anti-feminist," mindset—namely, racism and sexism—can be found in many areas of professional life.<sup>7</sup> Yet it is

6. I witnessed anti-minority feelings in a Lamaze childbirth class I attended not long ago. During this class, a film on labor and delivery was shown to about a dozen couples, most of whom were white. The film traced the experiences of two couples, one white and the other Black, as they went through labor and delivery. The white mother experienced much discomfort and had to use an oxygen mask. As a result, the fetus was under constant distress, shown by its color and muscle tone after delivery. Throughout the labor and delivery, the father became increasingly intense and made a number of demands on the nurses in a highly excited manner. The Black mother experienced little discomfort, although she had a slightly longer labor period, and joked with her husband about "going partying" after the delivery. The husband was also relaxed. He made no demands on the nurses. At the end of the film, several white couples in the class made similar comments: The white parents seemed to be in control and appeared to know what they were doing throughout the labor and delivery. The white parents were serious, and asserted their "rights." The Black parents were perceived to be out of control and unaware of what they should be doing—they were awkward, joked too much, made no attempt to demand their "rights," and so on. As these comments began to accumulate, the Lamaze instructor, who was also white, stepped in to offer her assessment of the film. The white parents, she said, were not in control. They were tense, the mother did not handle her pain well, the breathing and coaching were not good (hence the need of the oxygen mask for the mother), the baby had poor color and muscle tone, and there was much doubt in the moments after delivery whether the baby would live (hence the somber mood of the doctors and nurses in the delivery room). In contrast, the Black parents experienced an easy labor and delivery. They were in control, relaxed, joked a great deal, the baby had good color and muscle tone, and the liveliness of the delivery room reflected the medical staff's confidence in the delivery. Anti-minority, or anti-Black, feelings, I believe, were behind the class' negative and erroneous assessment of the Black parents.

7. Recent studies have reached the conclusion that racism and sexism are still impediments in the professional lives of minorities and females. The best statistical and testimonial study of the subject may be John Fernandez, *Racism and Sexism in Corporate Life* (1981). See also Glegg Watson & George Davis, *Black Life in Corporate America* (1982); *Progressive Report on the Black Executive: the Top Spots Are Still Elusive*, Bus. Wk., Feb. 20, 1984, at 104; William A. Henry, III, *Double Jeopardy in the Newsroom*, Time, Nov. 29, 1982, at 90; Richard Levine, *The Plight of Black Reporters: Why Unconscious Racism Persists*, TV Guide, July 25, 1981, at 22. The United States Civil Rights Commission has issued a report concluding that affirmative action is often the only way to overcome entrenched "institutional discrimination" against job applicants on the basis of race or sex. See N.Y. Times, Dec. 13, 1981, Section 4 (Week in Review) at 2, col. 2. The Supreme Court has similar views of affirmative action; see, e.g., *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1451 (1987); *Local 28, Sheet Metal Workers v. Equal Employment Opportunity Comm'n*, 106 S. Ct. 3019, 3036-37 (1986). Cf. James Smith and Finis Welch, *Closing the Gap: Forty Years of Economic Progress for Blacks* xxi (1986) (a study done for the U.S. Department of Labor by the Rand Corporation in which the authors conclude that affirmative action has "resulted in a radical reshuffling of [B]lack jobs in the labor force," especially toward "managerial and professional jobs."). On the specific issue of the anti-feminist mindset, see, e.g., Wall St. J., Aug. 5, 1985, at 16, col. 3 (a review of Peter Hartz, *Merger: The Exclusive Inside Story of the Bendix-Martin Marietta Takeover War* (1985) in which the reviewer, Tim Metz, a news editor of the Wall Street Journal, discussed the "anti-feminist passions" of some Martin Marietta directors). Charles E. Silberman in *A Certain People: American Jews*

still not easy for the victims of an anti-minority or anti-feminist mindset to pinpoint the existence of these mindsets in a manner that is sufficiently "objective" or "conclusive" for many white men. Even in Professor Bell's situation—where the incompetence of a Black faculty member is so presumed that the word of white first-year law students is given more weight than that of a former dean and Harvard law professor—some white males might be inclined to dismiss any claim of anti-minority mindset as "wild speculation" while others might call it "overreaction."

My ambition for this article is threefold. First, I will attempt to state the case for what I suspect most minority law professors already believe or know to be so—namely, that an anti-minority mindset exists among some white law professors who are called upon to evaluate minority candidates for appointment, promotion, and tenure. This discussion will take place in part I of the article.

In part II, I will examine the substance of an anti-minority mindset. Important questions to consider include: Is an anti-minority mindset simply a form of white "racism"? Or, is it race-neutral—perhaps something that minorities might feel or think if they were the majority group in this country? Through discussion of several more specific types of racial mindsets—"racial formalism" (or "simple racism"), "racial subordination" (or "complex racism"), and the "white self-interest phenomenon" ("racial" or "nonracial")—I hope to be able to not only add to an understanding of the anti-minority mindset, but also to raise the general issue of racial mindsets. I hope to raise the racial-mindsets issue in a way that is nonthreatening to the reader—whether he or she be conservative (paleo- as well as neoconservative) or liberal (non-practicing as well as a "good" liberal).

Finally, in part III I will explore the options available to minority candidates and to tenured minority law professors for dealing with an anti-minority mindset. I will argue that verbal confrontation rather than litigation is the best response to the problem.

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and *Their Lives Today* (1985) reaches the guarded conclusion that although being Jewish is no longer the major impediment to happiness and worldly success in the United States that it once was, anti-Semitism still exists in the United States, always threatening to change from its present covert state into a more overt state. Racism and sexism are not only overt today, but also color and gender remain significant barriers even to a middle class minority's or female's chances for happiness and worldly success in America. See, e.g., Walter Leavy, *What's Behind the Resurgence of Racism in America?* *Ebony*, Apr. 1987, at 132; Samuel Freedman, *Racial Tension in New York is on Increase Despite Gains*, *N.Y. Times*, Mar. 29, 1987, § 1, at 1, col. 1.

## I. Anti-Minority Mindset—Its Existence

The statistics showing the percentage of minority law professors, although not by themselves conclusive, are certainly probative of the presence of an anti-minority mindset. Of 6,660 full-time law professors in the 1985-86 academic year only 433, or approximately 6.5%, were minorities.<sup>8</sup> Worse, the number of minority law professors who leave the profession is quite high. Of the 351 full-time minority law professors teaching during the 1979-80 academic year, only 201 remain in the profession today.<sup>9</sup> "Minorities" are defined as Afro-Americans, American Indians, Alaskan natives, Asians, Pacific Islanders, Mexican-Americans, Puerto Ricans, and other Hispano-Americans.<sup>10</sup>

These suspiciously dismal percentages cannot be explained away by the arguments that not enough qualified minorities are available for law teaching positions, or that minority candidates who are considered for promotion or tenure are either incompetent teachers or lack the ability to become competent teachers. Many minority candidates for teaching positions have qualifications comparable to those of white candidates who are eventually hired.<sup>11</sup> Moreover, institutionalized defects in the law school personnel process rather than the supposed incompetency or poor quality of minority candidates provide better explanations for the low percentage of and high turnover rate for minority law professors.

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8. Memorandum 86-57, dated September 5, 1986 from Association of American Law Schools Executive Director to Deans of Member Schools. The percentages of full-time minority law teachers were approximately 6%, 6%, 5.8%, and 5.5% for the 1984-85, 1983-84, 1982-83, and 1981-82 academic years, respectively. *Id.*; Consultant's Memorandum Q58182-37, James P. White, Consultant on Legal Education to the American Bar Association, to Deans of ABA-approved Schools, June 16, 1982 (hereinafter Consultant's Memorandum). See also David Kaplan, *Hard Times for Minority Law Professors*, 7 Nat'l L.J., Dec. 10, 1984, at 1, col. 1.

9. These numbers are based on a comparison made by Professor Richard Delgado between the 1979-80 and 1985-86 editions of the Directory of Minority Law Faculty. Letter from Professor Delgado dated June 30, 1986 (on file with *Law & Inequality: A Journal of Theory and Practice*). As Professor Delgado observes: "Even discounting for missed names, the turnover—43% in six years—is remarkable, especially in so young a group." *Id.*

10. See Consultant's Memorandum, *supra* note 8.

11. Even the AALS Registry, which does not contain all qualified minority candidates, in recent years has listed many minority applicants with law review, federal judicial clerkship, or prestigious law firm experiences.

Significantly, a recently issued report of the American Bar Association's Task Force on Minorities in the Legal Profession did not find that qualified minorities attempting to participate in legal education or in other areas of the profession were in short supply. Rather, the report concluded that "lack of opportunity for minorities in the legal profession persists." See 72 A.B.A. J., Apr. 1, 1986, at 18. This author provided written testimony for the Task Force's study.

Many tenured minority law professors have observed a double standard in the law school personnel process. These minority law professors believe that their white male colleagues are inclined to more harshly judge minority candidates for appointment, promotion, or tenure than they are willing to assess white male candidates. This double standard, itself probative of the existence of an anti-minority mindset, has caused some minority law professors to conclude that their white male colleagues seem to believe only a "superstar" minority should be hired, promoted, or tenured.<sup>12</sup> The double standard is supported not only by the low percentage of, and high turnover rate for, minority law teachers, but also by observations of female law professors who, not being entirely immune from the double standard, have similarly noted that law faculties are "only looking for the [female] superstars."<sup>13</sup>

Another defect in the law school personnel process concerns the added responsibilities and pressures of being a minority law professor.<sup>14</sup> Minority law professors, like their white counterparts, are obligated to engage in full-time teaching, scholarship, and committee work. But unlike their white counterparts, minority law professors face special professional burdens. These burdens include dealing with the unique problems of minority law students, as well as the problems of white law students, minority community organizations, and the minority underclass.<sup>15</sup> Typically, these burdens are not factored into the promotion or tenure process, even though there is little reason to preclude law schools, especially private law schools, from doing so.<sup>16</sup> Relative to any claim of incompetency or poor quality, this fact would seem to be a more

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12. As Professor Bell has stated: "Thankfully or not, those folks [minority superstars] are in very short supply." Sally Goldfarb, *Education Without Representation*, 9 Student Law., May 1981, at 11. See Symposium, *The 1985 Minority Law Teachers' Conference*, 20 U.S.F.L. Rev. 383-576 (1986).

13. Gary Rivlin, *Climbing the Legal Ladder: Some Kinds of Discrimination Die Hard*, Update, Fall 1981, at 49.

14. See, e.g., *In Memoriam: C. Clyde Ferguson, Jr.*, 97 Harv. L. Rev. 1253, 1264-67 (1984).

15. See, e.g., Roy Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?* 20 U.S.F.L. Rev. 419, 420-24 (1986).

16. See, e.g., Roy Brooks, *Affirmative Action in Law Teaching*, 14 Colum. Hum. Rts. L. Rev. 15, 32-35 (1982). See also *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987), where in a 6-3 decision the Supreme Court held that, in response to a racially or sexually imbalanced work force, public employers can use race or sex-based preferences in hiring and promotion without fear of sustaining liability in a "reverse discrimination" suit under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1982). Without a prior finding of discrimination, however, public employers may sustain liability in an equal protection "reverse discrimination" suit. See e.g., *United States v. Paradise*, 107 S. Ct. 1053 (1987).

powerful explanation of why so few minorities are full-time law professors today.

In addition to the statistics, one could point to the collective experiences of tenured minority law professors to establish the existence of an anti-minority mindset. These minority law professors have witnessed firsthand the inner workings of the law school personnel process: the colleague who underscores the "underdeveloped" or "awkward" teaching style of a neophyte minority law professor whose teaching style in reality suffers from a normal lack of experience; the colleague who smugly announces, without any firsthand knowledge or other hard evidence, that the minority candidate unwittingly attempts to engage in classroom exercises far beyond the latter's intellectual capacity; the colleague who is pre-set to characterize minority scholarship as "simplistic," "descriptive," or "functional"; or the colleague who looks askance at minorities specializing in "race law" (i.e., civil rights). Evidence of this sort could fill a book.<sup>17</sup>

It should be understood that I am not suggesting that all white male law professors are anti-minority. Some give minority matters high priority. The fact is, however, that from my observations and discussions with minority *and* white male and female law professors, there is little doubt that some white male law professors seem pre-set to react negatively toward minority candidates for appointment, promotion, or tenure.<sup>18</sup>

Assuming some white law professors have an anti-minority mindset, is this mindset a form of racism, and if so, which type?<sup>19</sup> Is it an expression of something else, perhaps an expression of what Professor Bell calls the "white self-interest phenomenon," and if so, which type?<sup>20</sup> These questions are hardly insignificant. If an anti-minority mindset is a variant of either "simple racism"

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17. Evidence of this sort is, of course, largely undocumented, but continues to appear in verbal accounts given at minority law teachers' conferences and on other less formal occasions. Attempts are now being made to reduce the experiences of minority law teachers to writing. See, e.g., letter from Professor Richard Delgado of University of California Davis Law School dated June 30, 1986 (on file with *Law & Inequality: A Journal of Theory and Practice*). Some idea of a minority law teacher's quality of life can be gleaned from Symposium, *supra* note 12.; Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984).

18. The question of whether an anti-minority mindset exists is a difficult question to raise because it is threatening to many law professors. If law schools are serious about understanding the plight of minority faculty, increasing the number of minority law professors, and discharging their social and educational obligations, then the question of whether an anti-minority mindset exists must be raised. See *infra* notes 39-46 and accompanying text.

19. See *infra* notes 23-46 and accompanying text.

20. See *infra* notes 47-66 and accompanying text.



or the racially motivated version of the white self-interest phenomenon, then it may taint the law school personnel process with unlawful employment discrimination.<sup>21</sup> If, on the other hand, an anti-minority mindset is an expression of either "complex racism" or the nonracial white self-interest phenomenon, then, although a form of employment discrimination, it may not be capable of proof under existing employment discrimination law. This is because both racial mindsets probably fall short of the requisite motivation to prove disparate treatment employment discrimination, and statistical evidence sufficient to prove disparate impact employment discrimination would be difficult to obtain.<sup>22</sup>

An anti-minority mindset, I believe, is at a minimum a form of complex racism. It can also be a form of the nonracial white self-interest phenomenon.

## II. Anti-Minority Mindset—Its Substance

### A. *Anti-Minority Mindset as a Form of Racism*

Racism is a difficult word to use. To suggest its presence is to invite denial or anger, and to arouse intense controversy. Although not entirely free of controversy, the following statements indicate the difficulty one faces in attempting to understand the meaning of racism:

Racism is one of those words that many people use, and feel strongly about, but cannot define very clearly. Those who suffer from racism usually interpret the word one way while others interpret it quite differently. This ambiguity is possible in part because the word refers to ideas that are very complicated and hard to pin down. Yet, before we can fully understand how racism works or how to combat its harmful effects we must first try to define it clearly even though such an attempt may be regarded as wrong by many.<sup>23</sup>

*Webster's Seventh New Collegiate Dictionary* defines racism as "a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race."<sup>24</sup> The latter part of the definition ("inherent superiority") is the pejorative sense in which the term is most often used. That part of the definition makes it clear that simply being cognizant of one's race or acting in accordance with

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21. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982), prohibits employment discrimination based on race, color, sex, religion, and national origin.

22. See *infra* notes 67-124 and accompanying text.

23. Anthony Downs, *Racism in America and How to Combat It*, in Derrick Bell, *Race, Racism and American Law* 87 (1973).

24. *Webster's Seventh New Collegiate Dictionary* 704 (1966).

that awareness is not necessarily racism. Thus, "pride" in one's Black heritage, or Irish ancestry, is not necessarily racism.<sup>25</sup>

Although minority racism surely exists, the relationship between whites and minorities, especially Blacks, in this country has been mainly influenced by white racism.<sup>26</sup> As Harry Ashmore, the Pulitzer Prize-winning author states in his vivid epic, *Hearts and Minds: The Anatomy of Racism from Roosevelt to Reagan*:

The concept of white supremacy had been exalted in the South in defense of slavery, but it was by no means confined to the region. Belief that whites were inherently superior to colored people was embedded in the precepts of the European nations that provided the original American settlers, and the immigrants who came later.<sup>27</sup>

Significantly, racism—a belief in white supremacy—is a matter of concern to minorities less because of the attitude it exhibits than because of the effect it causes: harmful treatment. Since minorities in the United States exercise less power than the white majority, racism normally translates into physical or psychological subordination of minorities. Thus, the major problem with racism, from a minority viewpoint, is that it can cause subordination of minorities.

Because the state of mind of one who perpetuates minority subordination makes little difference to those who suffer from minority subordination—i.e., minorities—racism is defined by minorities to include minority subordination. The persistent submission or capitulation of important minority interests to the interests of whites is a form of racism in the "hearts and minds" of minorities.<sup>28</sup> In many instances, the minority definition of racism actually goes beyond an occasional reference to minority subordination. When the term "racism" is used in minority communities, it often refers *solely* to minority subordination. The harm is so discernible, so unmistakable, that the perpetrator's state of mind (or, as in the case of societal discrimination, the perpetrator's very existence) becomes irrelevant. Moreover, whether the harm is backed by a racial animus does not change its existence or ameliorate the pain suffered by its victims. In short, when individuals or institutions having "good" intentions engage in a pattern or practice of granting low priority to matters of keen im-

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25. Downs, *supra* note 23, at 88.

26. See, e.g., Joel Kovel, *White Racism: A Psycho-history* (1970).

27. Harry Ashmore, *Hearts and Minds: The Anatomy of Racism from Roosevelt to Reagan* 138 (1982).

28. See, e.g., Derrick Bell, *Race, Racism and American Law* 41 (2d ed. 1982); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1342-44 (1986).

portance to minorities—such as real equal access to quality jobs, education, and housing—that is subordination and, hence, racism, as far as minorities are concerned.<sup>29</sup>

In reality, then, “racism” can be defined in two distinct ways. First, it can be defined in a formal, dictionary sense, with emphasis on a perpetrator’s state of mind, or on a particular *source* of harm, namely, a belief in white supremacy (hereinafter referred to as “racial formalism” or “simple racism”). Second, it can be defined environmentally, or in terms of the *harm produced*, namely, persistent exclusion from society’s bounties (hereinafter referred to as “racial subordination” or “complex racism”).

Racial formalism, “far from being the simple delusion of a bigoted and ignorant minority, is a set of beliefs whose structure arises from the deepest levels of our lives—from the fabric of assumptions we make about our world, ourselves, and others, and from the patterns of our fundamental social activities.”<sup>30</sup> If the roots of racial formalism are planted deeply within the individual, then the insecure individual seems to provide extraordinarily fertile ground for the growth of racial formalism. White law professors who are very insecure about their abilities or jobs can easily sprout racial formalism. Having no particular distinctions that could establish them as leaders in their fields or as valuable assets to their respective law schools, these individuals are but marginal white males, as bland and as borderline as Sinclair Lewis’ George F. Babbitt.<sup>31</sup> “[I]t is often the least powerful who are the greatest bigots, while those at the top bask in tolerance and magnanimity.”<sup>32</sup>

Racial subordination, the more sophisticated form of racism, has little to do with intentional or conscious bias, although it can also be deeply rooted in an individual or well entrenched within an institution. Racial subordination arises from what writer Eudora Welty once called “the moral style of a life,” to which I would add the moral style of institutional practices. In a word, racial subordination is largely the by-product of a soul taken over by racial indifference or insensitivity.

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29. It is much like a car that runs a traffic light. Whether the driver intended to run the traffic light is immaterial to the ultimate question of whether he in fact ran the traffic light and whether he in fact committed a traffic violation. Another analogy is in the area of employment discrimination law in which the Supreme Court has defined employment discrimination both in terms of acts motivated by a racial animus and acts unassociated with any such state of mind but which have a certain impact on a protected class. See *infra* notes 83-87 and accompanying text.

30. Kovel, *supra* note 26, at 3.

31. Sinclair Lewis, *Babbitt* (1922).

32. Kovel, *supra* note 26, at 9.

Several prominent minority law professors have recently suggested that racial indifference or insensitivity, if not racial formalism, not only exists among white law professors, but is increasing. In an "Open Letter to Our Colleagues of the Majority Race," twenty-two minority law professors stated that most of them have experienced indignities at the hands of their white colleagues. The letter went on to state:

Moreover, the situation at many law schools seems to be worsening, not improving. Responses to a letter sent to every minority law professor confirmed our initial impression: the professional lives of minorities of color teaching at the nation's law schools have been deteriorating in recent years . . . . Many of us sense decreasing institutional support and increasing challenges to our legitimacy as teachers in the classroom.<sup>33</sup>

It would be a large mistake to assume that law professors are too well-informed, sophisticated, or intelligent to fall prey to racial subordination or to play a childish game of racial formalism.

Recognizing that law professors are not immune from racism and, as discussed in part I, that some law professors may have an anti-minority mindset, are these racial mindsets coextensive? Is an anti-minority mindset exhibited in the law school personnel process simply an expression of racism? More specifically, is an anti-minority mindset a form of racial subordination, racial formalism, or both?

I believe that when a white law professor exhibits an anti-minority mindset in the personnel process, he or she is certainly practicing racial subordination and may also be practicing overt or covert racial formalism. The act of consistently inveighing against or voting down qualified minority candidates is a clear act of racial subordination. An anti-minority mindset and racial subordination are identical mindsets.

An anti-minority mindset may also be an expression of racial formalism. Reviewing minority applicants more harshly than white applicants, being less tolerant of even small mistakes committed by minority teachers, and consistently offering negative comment on the parade of minority candidates for law professorships who come through the personnel process year after year at least suggests the presence of racial formalism. A white law professor who does this consistently may be acting upon at least a

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33. Letter from Minority Law Professors to White Law Professors dated August 1986 (on file with *Law & Inequality: A Journal of Theory and Practice*). This letter was inspired mainly by the Stanford Law School incident involving Professor Bell as discussed previously in this article. See *supra* notes 1-5 and accompanying text.

mild belief or suspicion that minority candidates or law professors are subpar or inherently inferior law teachers. Some minority candidates may not be as qualified as some white candidates based on traditional selection criteria,<sup>34</sup> but to say that *no* minorities are qualified or that *most* minorities are unqualified is racism pure and simple.

In short, an anti-minority mindset can be a form of either simple or complex racism. An anti-minority mindset is functionally indistinguishable from racial subordination because it results in the persistent rejection of important minority interests in legal education and employment.<sup>35</sup> It may also share the motivation behind racial formalism—a belief in white supremacy.<sup>36</sup> More precisely, it can manifest itself as racial prejudice, itself a form of simple racism,<sup>37</sup> which means to make a “rash judgment” about a racial minority or a member of such group. According to Theodore Hesburgh’s introduction to a study on racism in the United States, “Fundamentally, [racial prejudice] involves passing detrimental or negative judgment on a person or a group without sufficient evidence . . . . [Racial prejudice] brings in its train fear, suspicion, revulsion, hatred—all unfounded . . . .”<sup>38</sup>

34. The stated criteria for granting tenure at most law schools are effective teaching, substantial scholarship, and good university and community service. See, e.g., Brooks, *supra* note 16, at 15.

35. See *supra* note 28 and accompanying text.

36. See *supra* note 24 and accompanying text.

37. See Prejudice U.S.A. (Charles Glock & Ellen Siegelman eds. 1969) [hereinafter Prejudice].

38. Theodore Hesburgh, *Foreword*, in Prejudice, *supra* note 37, at v-vi. Prejudice, or rash judgment, should be distinguished from erroneous judgment, and must be understood to be an acquired attitude:

[Prejudice] is more pernicious and more inflexible. Shown factual errors behind our other judgments, most of us will modify our views willingly enough. Not so with prejudice. Show a bigot that his negative judgment is falsely founded, and he will quickly find two or three other rationalizations for it in terms of his interests, his values, or imagined or presumed “facts.” Prejudice puts out roots in all directions. Destroy one; another is already burgeoning; Demonstrate that Negroes are not biologically inferior, and they may be condemned as lazy for not developing their talents. Prejudice, then, is not only wrong judgment, it is inflexible judgment, almost always finding its outlet in discriminatory action.

Yet, ironically, this poison of personal relations, this corrosive element of our human nature, is not something with which we are born. We learn it; we foster it; and we pass it on to others. It begins because of a perception of difference—difference of color, language, religion, social or economic situation, physical appearance, even sex. We follow this perception of difference with an evaluation and a comparison: What we have or are is the best, so anything different must be inferior. Prejudice has led to and fed on war, oppression, conquest, slavery. One thinks of the hostility between Jew and Arab, Occidental and Oriental, Irishman and Englishman, German and Frenchman, or North-

Though it may be possible to explain acts of racial subordination or racial formalism in nonracial terms by the assertion that more qualified white applicants were selected, this is quite a different issue. While the selection of more qualified white applicants under these circumstances raises the issue of whether racial subordination or racial formalism is justified, the selection does not alter the fact that racism in some form has taken place.

The issue of whether the selection of more qualified white candidates justifies either racial subordination or racial formalism is really another way of asking whether the law school, as a matter of institutional policy, should deem it necessary to have qualified minorities on its faculty, even if it means occasionally passing up more qualified white applicants. Assuming, *arguendo*, on the basis of traditional law school hiring criteria,<sup>39</sup> a particular white applicant is "more qualified"<sup>40</sup> than a particular minority applicant competing for the same position, there are compelling educational and societal reasons for selecting the minority applicant.

The absence of minority law teachers, or their token presence on a faculty, not only directly affects minority students by denying them role models, it also has an adverse effect on the quality of legal education for all students and on the professional development of the law faculty. White students and white law professors are denied the opportunity of understanding important legal problems from a minority perspective. The issue of race has had such an influence on doctrinal developments in many areas of the

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erner and Southerner in a host of countries (Korea, Vietnam, the United States, and many others).

*Id.* at vi.

39. See *supra* note 34.

40. It seems to me that the term "more qualified" should take into account the realities of minority life, including the lingering effects of past racial discrimination. For example, a minority applicant who has overcome many obstacles in arriving at the professional level he or she now occupies may be "more qualified" for law school teaching than a white applicant who started out in life with substantially more advantages and, consequently, has more traditional credentials (law review, judicial clerk, and so on) than the minority applicant. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971) ("History is filled with examples of men and women who rendered highly effective service without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees.") Because of his or her personal struggles, the minority applicant may be a more motivated teacher or assiduous scholar or may even be able to better empathize with the plight of struggling law students. Also, I do not believe that anyone who takes cultural diversity seriously can truthfully say that a qualified minority applicant is "less qualified" than a white qualified applicant for a teaching position at a law school that is 95% white and male. If cultural diversity counts for anything, it should make a difference in this type of case. Cf. Susan Westerberg Prager, *President's Message—Collegial Diversity*, A. Am. L. Sch. Newsletter 1 (No. 86-3, Sept. 1986). See *infra* note 41.

law<sup>41</sup> that its place in the well-rounded curriculum, which legal

41. I am grateful to my colleague, Edmund Ursin, for his valuable suggestions regarding this line of argument. In constitutional law and civil rights law, issues of race and slavery have played major roles in the judicial construction of several constitutional amendments (e.g., 8th, 13th, 14th, and 15th amendments) and statutory provisions (e.g., 42 U.S.C. §§ 1981, 1982 (1982)). See, e.g., Bell, *supra* note 28; William Lockhart, Yale Kamisar, & Jesse Choper, *Constitutional Law* 592-625, 1245-1379 (5th ed. 1980); Gerald Gunther, *Constitutional Law* 705-862, 972-1103 (10th ed. 1980). The question of race has also influenced doctrinal developments in at least the following other areas of law.

*Civil Procedure*: "Public Law litigation," sometimes called "institutional reform litigation," was created by the attempt of lower federal courts, especially district courts, to enforce the school desegregation decree promulgated in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*). See, e.g., Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice* 1, 2-5 (1979). See generally David Louisell, Geoffrey Hazard, & Colin Tait, *Pleading and Procedure* 1083-1147 (5th ed. 1983); Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1282-1302 (1976). The doctrine of intervention in both federal and state courts has been further liberalized through application in public law litigation and in cases involving a racial issue. See, e.g., *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Bustop v. Superior Court*, 69 Cal. App. 3d 66 (1977). *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the landmark decision on United States slavery, came before the Supreme Court on the issue of federal subject matter jurisdiction—i.e., whether an emancipated slave is a citizen of a state for purposes of federal diversity jurisdiction. 60 U.S. at 403. See generally Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978).

*Constitutional Torts*: Section 1983 (42 U.S.C. § 1983 (1982)) allows any person who is deprived of a federal statutory or constitutional right under color of state law to sue the wrongdoer for damages. This burgeoning area of law traces its source to section 1 of the Act of April 20, 1871 (also known as the Klu Klux Klan Act of 1871), 17 Stat. 13 (1871). See *Monroe v. Pape*, 365 U.S. 167, 171 (1961). Section 1983 has been heavily shaped by considerations of race. See, e.g., Kenneth Davis, *Constitutional Torts* 211-78 (1984); Bell, *supra* note 28, at 220; Roy L. Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 Cornell L. Rev. 258, 262-63, 269-71 (1977).

*Property Law*: Racial considerations have affected, among other things, the right of disposition, see, e.g., *Jones v. Alfred M. Mayer Co.*, 392 U.S. 409 (1968); the enforceability of private agreements, see, e.g., *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 180, 640 P.2d 115 (1982), *cert. denied* 103 S. Ct. 129 (1982); and land use planning, see, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). See generally John Cribbet & Corwin Johnson, *Property Cases and Materials* 48-54, 76-83, 460-71, 1051-62 (5th ed. 1984).

*Criminal Procedure*: The issue of race has shaped such areas of criminal procedure as the peremptory challenge, see, e.g., *Batson v. Kentucky*, 106 S. Ct. 1712 (1986); and voir dire, see, e.g., *Turner v. Murray*, 106 S. Ct. 1683 (1986). See generally Yale Kamisar, Wayne LaFave, & Jerold Isreal, *Modern Criminal Procedure* 933-53, 1028, 1033, 1273-77, 1331-59 (5th ed. 1983).

*Labor Relations Law*: Race has played an important role in the law governing, among other things, a union's primacy over the individual, see, e.g., *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975); the union's duty of fair representation, see, e.g., *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); and union elections, see, e.g., *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962). See generally Clyde Summers, Harry Wellington, & Alan Hyde, *Labor Law* 71-99, 373-87, 843-55 (2d ed. 1982).

*Trusts and Estates*: The issue of race has even played a role in the law concern-

educators universally seek, cannot be seriously questioned. A minority legal perspective also helps to round out legal theories law professors labor to develop in order to illuminate the current condition and path of the law. Law and race, in short, engender curriculum and faculty development no less than traditional legal analysis, comparative legal analysis, clinical legal education, critical legal studies, law and economics, law and society, and a feminist legal perspective. Underscoring the importance of what she calls "collegial diversity," Dean Susan Westerberg Prager, president of the Association of American Law Schools, has stated: "The different perspectives of our colleagues can illuminate other areas of research to give us new classroom direction. Our students deserve an education framed from many different perspectives and the broader curriculum that comes from faculty members with different identities and interests."<sup>42</sup>

Some law students have recognized the important role minority law professors play in legal education. As one white student leader has stated: "We want recognition of the premise that a faculty ninety-six percent white and male does not provide an equal education for all students and doesn't provide the *best* education for any students, including white males."<sup>43</sup>

It is remotely possible that a "more qualified" white applicant would have such a strong practical foundation in a minority perspective and would be sufficiently sensitive to the historical dimensions of problems currently encountered by minorities that he or she could competently raise and treat issues of race within the law school community. Surely, however, this person's credibility in the presentation of racial issues would not be as great (especially to minority students) as a minority law professor's credibility—just as a male's credibility in the presentation of feminist issues would not be as great as a female's credibility. One who has lived the life of a minority in this society for so long may not speak *ex cathedra* on issues of race, but certainly does speak with a kind of wisdom and sagacity that cannot be obtained vicariously.

The issue of who can best present a minority legal perspective goes beyond the matter of credibility. This issue also invokes

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ing the creation and administration of charitable trusts. See, e.g., George Bogert & Dallin Oaks, *Law of Trusts* 216-18 (1977).

*Employment Discrimination*: This area of law draws heavily upon cases involving racial discrimination. See, e.g., Barbara Schlei & Paul Grossman, *Employment Discrimination Law* (2d ed. 1983); Michael Zimmer, Charles Sullivan, & Richard Richards, *Cases and Materials on Employment Discrimination* (1983).

42. Prager, *supra* note 40, at 1.

43. Sally Goldfarb, *Education Without Representation*, 9 *Student Law*. 11 (May 1981).



important considerations of integrity of and domination within democratic institutions. As Judge Wyzanski has stated:

To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy. Suppression, intentional or otherwise, on the presentation of non-white claims cannot be tolerated in our society . . . . In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking [B]lack men. The day of the minstrel show is over.<sup>44</sup>

The social reasons for selecting the minority applicant over the "more qualified" white applicant are equally compelling. A law school, as a tax-exempt or "public benefit" institution and major distiller of values in United States society, has a social obligation to maximize anti-discrimination values, including "the expansion of employment opportunities for American [minorities]."<sup>45</sup> This obligation may even rise to the level of a moral duty. Professor Torres of the University of Minnesota Law School expands on the social responsibility of law schools in the following statement:

Both public and private law schools have a public obligation. Part of that public obligation is *non-discrimination* in education and in hiring. I am suggesting, I recognize, an obligation that goes beyond Title VII requirements. Yet, to deny that such an obligation exists puts the burden on that person to give contrary obligations which outweigh our moral duty as lawyers, that is, as representatives of the *law*, to eliminate the continuing subordination of one (or more) racial or ethnic group to another . . . . [T]he legitimizing role that law schools play in the creation and validation of law makes them central players in the struggle to eliminate racism from our society. I also think that such a claim can be made without exaggerating the place of law schools in American society.<sup>46</sup>

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44. *Western Addition Community Organization v. N.L.R.B.*, 485 F.2d 917, 940 (D.C. Cir. 1973) (Wyzanski, J., dissenting), *rev'd*, 420 U.S. 50 (1975). Generally, white law professors have not given adequate treatment to a minority perspective on questions of race in the law. See, e.g., Delgado, *supra* note 17; Robert M. O'Neil, *A Reaction to "The Imperial Scholar" and Professor Delgado's Proposed Solution*, 3 *Law & Inequality* 255 (1985); Richard Delgado, *The Author Replies*, 3 *Law & Inequality* 261 (1985).

45. Roy L. Brooks, *Affirmative Action in Law Teaching*, 14 *Colum. Hum. Rts. L. Rev.* 15, 33 (1982).

46. Letter from Professor Gerald Torres dated June 13, 1986 (on file with *Law & Inequality: A Journal of Theory and Practice*). The presence of minorities on a law school faculty also "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices." *Local 28, Sheet Metal Workers v. Equal Employment Opportunity Comm'n*, 106 S. Ct. 3019, 3037 (1986), citing *N.A.A.C.P. v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974).

In addition to racism, an anti-minority mindset may be a variant of the white self-interest phenomenon. As will be seen in the next section, this phenomenon is as old as racism in the United States, but is more easily defined than racism.

*B. Anti-Minority Mindset as a Form  
of White Self-Interest*

Professor Derrick Bell has defined the white self-interest phenomenon in the following manner: "[E]ven civil rights laws and decisions favoring [B]lack occur only when the interests of whites will be furthered—or at least not seriously threatened—thereby."<sup>47</sup> Blacks benefit only when whites in control of United States institutions also benefit, or at least are not seriously threatened by, action on behalf of Blacks. Blacks do not gain if whites in control will experience significant pain.

This phenomenon, which seems applicable to all racial minorities, can arise from two distinct nonracial beliefs. The first is that white United States citizens, like all other United States citizens, should use whatever power they possess to win social, political, and economic advantage for themselves at every turn.<sup>48</sup> The second belief, held even by Benjamin Franklin and other abolitionists,<sup>49</sup> is that while other countries may belong to other races (e.g., Africa is a Black homeland), the United States—and, by extension, its vital institutions—belongs to whites, always has, always will.<sup>50</sup>

Lincoln's grant of freedom to the slaves is a classic illustration of the white self-interest phenomenon. In response to New York Herald Tribune editor Horace Greeley, one of many abolitionists who urged the President to free the slaves, Lincoln stated that his main objective in freeing the slaves was to save the Union, not to eliminate the institution of slavery: "My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery."<sup>51</sup>

Supreme Court decisionmaking in the area of civil rights may be another classic illustration of the white self-interest phenomenon. Some civil rights lawyers argue that even the liberal Warren

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47. Derrick Bell, *Race, Racism and American Law* 83 (1973).

48. See Theodore Cross, *The Black Power Imperative* (1985).

49. I do not mean to suggest that some abolitionists were not racist. The fact is that some felt Blacks were inferior human beings. See, e.g., William H. Pease & Jane H. Pease, *Antislavery Ambivalence: Immediation, Expediency, Race*, 17 *Am. Q.* 682 (1965).

50. Slaughter Lynd, *Slavery and the Founding Fathers*, in *Black History: A Reappraisal* 119 (Melvin Drimmer ed. 1968).

51. *Speeches and Letters of Abraham Lincoln, 1832-1865*, at 194-95 (M. Rowe ed. 1907).

Court ruled in accordance with the white self-interest phenomenon. For example, a staff attorney for the NAACP has argued that during the Warren era, civil rights for Blacks advanced only as far as was necessary to protect the image of whites. In discussing the Court's decision in *Brown v. Board of Education*,<sup>52</sup> the author stated:

In 1954, the Court was in a position to serve notice on the American people that equality was an absolute right of all citizens, that this right came before all other rights and that its further subversion could not be tolerated. By taking this stance, the Court could not only have gone a long way toward relieving its conscience but it could also have established itself as a true constitutional court, dedicated to an impartial search for just principles, irrespective of race.

Instead, the Court chose to act in the manner of the practical reformer. Rather than ordering sweeping desegregation, it ordered another hearing. A year later, the Court ruled that the South did not have to desegregate its schools immediately, it merely had to do so "with all deliberate speed." Never in the history of the Supreme Court had the implementation of a constitutional right been so delayed or the creation of it put in such vague terms. The Court hereby made clear that it was a white court which would protect the interests of white America in the maintenance of stable institutions.

In essence, the Court considered the potential damage to white Americans resulting from the diminution of privilege as more critical than continued damage to the underprivileged. The Court found that public reasons—the offense to white sensibilities—existed to justify the delay in school desegregation. Worse still, it gave the primary responsibility for achieving educational equality to those who had established the segregated institutions.

This decision to delay integration and ignore racially discriminatory mechanisms was more shameful than the Court's 19th-century monuments to apartheid. For, by the mid-20th century, there was no basis on which the Court's nine educated men could justify a segregated society. Scientific racism had been discredited and Americans had been exposed to the full implications of racism in Nazi Germany.<sup>53</sup>

Two major questions arise from an understanding of the

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52. 349 U.S. 294 (1955) (*Brown II*).

53. Lewis Steel, *Nine Men in Black Who Think White*, N.Y. Times Mag., Oct. 13, 1968, at 56. Recent disclosures by Philip Elman, a former law clerk to Justice Felix Frankfurter who served as a Justice Department civil rights lawyer at the time *Brown* was pending before the Supreme Court, squarely support Mr. Steel's claim concerning the Court's "with all deliberate speed" ruling. That ruling served to allay the fear several justices had that immediate school desegregation would result in virtual warfare across the South. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: an Oral History*, 100 Harv. L. Rev. 817, 827-30 (1987); see also, Time, Apr. 6, 1987, at 71.

white self-interest phenomenon. First, is an anti-minority mindset an expression of the white self-interest phenomenon? Second, is the white self-interest phenomenon a form of racism (simple or complex)?

An anti-minority mindset can be a variant of the white self-interest phenomenon. Within the context of the law school personnel process, an anti-minority mindset can vindicate at least two interests of white law professors. The first relates to marginal white males on the faculty.<sup>54</sup> Minority candidates pose a direct threat to this segment of the faculty, who have little power in vying for scarce law school resources. Rejecting minority candidates, especially at the tenure stage, reduces the competition for white males who are not at the top of the pecking order in terms of merit-pay increases, travel funds, and other scarce administrative resources. Marginal white males are vulnerable in another more threatening manner. Feeling an acute financial pinch engendered by recent reductions in student applications,<sup>55</sup> some law schools have talked openly about laying off even tenured faculty. If a law school has to decide whether to lay off either a tenured minority law professor or a tenured white professor, a marginal white male seems less likely to prevail under the weight of affirmative action considerations than a white male who has made a more substantial contribution to the law school.

Another white self-interest that may be vindicated by the anti-minority mindset concerns the law school's reputation. A law school's reputation is like goodwill in a business—it is a vital asset, without which the enterprise could not thrive.<sup>56</sup> Some white law professors may believe it is an unfortunate fact of life in our still-racist society that a law school's reputation—national, regional, or local—would suffer if “too many” minorities were hired or received tenure. A few minority law professors will not adversely affect a law school's reputation. Indeed, not unlike the proper amount of leverage on a corporation's balance sheet,<sup>57</sup> a law school's image of fairness, openness, and diversity is enhanced by having a few minority law professors. But it would be a cultural anomaly to imagine the most prestigious law faculties in the

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54. See *supra* note 31 and accompanying text.

55. According to the American Bar Association, law school applications have dropped 25% in the last four years. San Diego Tribune, Oct. 22, 1986, at C5, cols. 2-3. See also David Kaplan, *Enrollment Continues to Plunge: Why is Student Interest Waning?* 7 Nat'l L.J., April 8, 1985, at 4, col. 2; Sarah Hoban, *Law School Go-Around: Tuition Up, Applicants Down*, 13 Student Law. 12 (Sept. 1984).

56. See, e.g., Victor Brudney & Marvin Chirelstein, *Corporate Finance* 286-88 (2d ed. 1979).

57. See, e.g., *id.* at 317-23.

United States as 40%, 50%, or 60% minority, even if minorities were clearly the most qualified law teachers.<sup>58</sup>

An anti-minority mindset, in short, can be an expression of the white self-interest phenomenon when it arises from either or both basic beliefs underpinning that phenomenon: (1) white individuals, as all United States citizens, should use whatever power they possess to win social, political, and economic advantage at every turn;<sup>59</sup> (2) United States institutions, in the final analysis, belong to whites.<sup>60</sup> Marginal white males may be motivated by the first belief more than the second, and those white male professors who are concerned with the law school's reputation may be motivated by the second belief more than the first.

The second question (namely, is the white self-interest phenomenon a form of racism?), can be understood as an attempt to bring all three racial mindsets—anti-minority, racism, and white self-interest—together. To the extent the white self-interest phenomenon results in persistent exclusion of minorities from law faculties, it is functionally indistinguishable from complex racism.<sup>61</sup> In this sense, an anti-minority mindset and the white self-interest phenomenon both partake of racism defined as racial subordination.<sup>62</sup>

Whether the white self-interest phenomenon is also nothing more than a sophisticated form of racial formalism is a most significant question. An affirmative answer would, of course, mean that an anti-minority mindset, regardless of the racial perspective from which it is considered, is an expression of racism.<sup>63</sup>

While it is clearly possible that a belief in white supremacy can motivate white self-interest, the nexus between the two is not absolute. As noted earlier, two distinct nonracial beliefs can motivate or support the white self-interest phenomenon.<sup>64</sup> These nonracial beliefs can provide stronger motivation for white selfish behavior than racial formalism, because they are intellectually stronger than simple racism and are otherwise sufficient to give whites the benefits they seek by acting selfishly toward minorities.

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58. White law professors who reject minority applicants in order to protect a law school's reputation give support to societal racial discrimination. The desire to protect a law school's reputation, because it supports societal racial discrimination, may be more racial than nonracial. See *infra* notes 61-65 and accompanying text.

59. See *supra* note 48 and accompanying text.

60. See *supra* note 50 and accompanying text.

61. See *supra* note 28 and accompanying text.

62. See *supra* note 35 and accompanying text.

63. At least one student of racism has suggested that the white self-interest phenomenon and racism are the same thing. See Ashmore, *supra* note 27, at 138.

64. See *supra* notes 48-49, 59-60 and accompanying text.

Hence, the white self-interest phenomenon does not have to be motivated by simple racism in order to benefit whites.

Another reason for concluding that the white self-interest phenomenon is not merely a sophisticated form of racial formalism has to do with the nature of the nonracial beliefs. These beliefs, or motivations, seem genuinely nonracial. The belief that individuals should promote themselves is essentially based on a personal-maximizing principle, and the belief that the United States belongs to whites is based on white possessiveness. Neither rationale is explicitly based on a belief in white supremacy.<sup>65</sup>

Correctly understood, the personal-maximizing principle is an individual strategy. Using a variety of means, the individual seeks only to maximize personal gain. To the extent that the means chosen include using racist commentary or other racist acts, the individual, or "maximizer," avoids racial formalism if he or she is not a true believer in white supremacy. The maximizer does *not*, however, avoid racial subordination, for which he or she should be condemned as morally and socially irresponsible as well as "racist." In short, the true maximizer is interested only in individual supremacy, not white supremacy.

White possessiveness, like personal maximization, is not necessarily motivated by a belief in the inherent superiority of whites. It can be based on one or both of the following nonracial beliefs. First, a kind of "we've got ours; it doesn't matter how we got it, we mean to keep it" line of thinking. Second, notwithstanding the so-called "American melting pot" and the social reality that defines it as a polyglot, multiracial society, power in this society is mainly in the hands of white males, and this is how it should be, because this country was built by white males more than any other group. Thus, the whiteness of United States institutions, cultures, and society is no accident of history, and it is not unjustified.

Even if predicated on genuinely nonracial beliefs, the white self-interest phenomenon can be faulted for its unrestrained majoritarianism. This country and her institutions are not the exclusive property of the majority. Moreover, the right of the majority to maximize their power is limited. Majoritarianism is limited not only by constitutional guarantees<sup>66</sup> but also by the moral principle implicit in those guarantees that the powerful shall not use its lib-

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65. It is difficult to determine when the white self-interest phenomenon is motivated by a racial or nonracial belief. In the context of employment discrimination litigation, moreover, proving racial motivation is normally difficult. See *infra* notes 67-124 and accompanying text.

66. *E.g.*, U.S. Const., amends. 1-10, 13, 14, 15.

erty to destroy liberty for the powerless. The powerful may not invoke a right to destroy liberty for the powerless.

It may be difficult for minority candidates and minority law professors to do anything concrete about an anti-minority mindset among white law professors without the support of other white law professors. Litigation is doubtful at best. The only effective means of redress may be for tenured minority law professors, with the support of enlightened white colleagues, to verbally confront nonsupportive white law professors at faculty meetings. I develop these points next.

### III. Anti-Minority Mindset—What Can Be Done About It?

Precisely what can be done to challenge an anti-minority mindset may turn on a determination of its substance. If the anti-minority mindset is in substance complex racism or the nonracial white self-interest phenomenon, then the injured minority candidate or law professor could not seriously contemplate filing an employment discrimination lawsuit against the law school under Title VII of the 1964 Civil Rights Act,<sup>67</sup> the nation's major employment discrimination law. This is because the lawsuit necessarily would be based on racial subordination—in other words, on the effects rather than on the intent of the law schools' employment practices<sup>68</sup>—which is actionable under Title VII only if supported by sufficient statistical evidence.<sup>69</sup> There are probably too few minority candidates who apply to specific law schools during a given time frame to create a minority applicant pool large enough to be statistically significant.<sup>70</sup> The even smaller number of minority law teachers at individual law schools creates a greater statistical problem for the minority teacher denied promotion or tenure.<sup>71</sup>

A more appropriate response to racial subordination would be one not involving litigation. Such a response might be initiated by tenured minority law professors. It could include verbally con-

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67. 42 U.S.C. §§ 2000e-2000e-17 (1982).

68. This would be the disparate impact theory of employment discrimination. See *infra* notes 84-87 and accompanying text.

69. See, e.g., *Connecticut v. Teal*, 457 U.S. 440 (1982); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

70. While the Supreme Court has not stated how large a sample must be in order to be statistically significant, it is clear that a Title VII plaintiff must prove that an employer's selection criteria for hiring or promotion creates a "significant" racial disparity. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

71. For a detailed discussion of the use of statistics to prove disparate impact, see, e.g., Schlei & Grossman, *supra* note 41, at 80-161; Elaine Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 Harv. L. Rev. 793 (1978).

fronting white colleagues to try to change the way they think about the relative qualifications of minority and white applicants, the concept of quality legal education (including curriculum and faculty development), and the social obligations of law schools.<sup>72</sup> Tenured minority law professors certainly should attempt to raise the faculty's awareness about the existence and substance of an anti-minority mindset in the personnel process, and about racial mindsets in general.

If, on the other hand, an anti-minority mindset is a form of racial formalism or the racial variety of the white self-interest phenomenon, then an appropriate response would be for tenured minority law professors, with the support of sympathetic white colleagues, to verbally confront racist white colleagues. The purpose of verbal confrontation in this case, however, is not enlightenment—that probably will not happen<sup>73</sup>—but vindication of truth, fairness, and human dignity. Verbal confrontation will also make it difficult for the offending colleagues to accomplish their objectives, because they will be forced to openly defend the merits of their statements and behavior.

Title VII litigation would also be a logical response to a racist mindset. It would not, however, be an intelligent response. A better response is for the injured minority candidate to sue the law school under liberal state employment discrimination law.<sup>74</sup> Title VII affords little protection of minority employment rights in the law school personnel process and, consequently, should be avoided by minority candidates.<sup>75</sup> Title VII may be a moribund law when it comes to redressing sophisticated forms of employment discrimination, such as we have in the 1980s.<sup>76</sup> Surprisingly, this has less to do with the fact that Title VII was born at a time when most forms of racism were overt<sup>77</sup> or with the transaction costs attentive upon complex litigation generally<sup>78</sup> than with recent Supreme Court

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72. See *supra* notes 39-46 and accompanying text.

73. See *supra* notes 30, 38, and accompanying text.

74. See, e.g., Cal. Gov't Code §§ 12900-12996 (West 1980 & Supp. 1985); Marjorie Gelb & JoAnne Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 Hastings L. Rev. 1055 (1983).

75. Tenured minority professors will not have standing to sue where the injury runs to a minority candidate.

76. See generally Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982); Andrea Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45 (1979).

77. For an excellent discussion of Title VII legislative history, see Francis Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966).

78. E.g., payment of attorneys' fees up front, delay in litigation, and protracted litigation. See, e.g., Edward Levi, *The Business of Courts: A Summary and a Sense*



and lower federal court constructions of Title VII. Recent federal cases have made it difficult for Title VII plaintiffs to win their cases. To illustrate this point, I will discuss two areas of Title VII law that present serious problems for minority candidates proceeding against an anti-minority mindset: proof of racial motivation and establishment of a legal nexus between such state of mind and the harmful act. Before embarking upon this discussion, it may be helpful to begin with a brief explanation of Title VII's concepts of discrimination.

Although Congress made employment discrimination on the basis of race,<sup>79</sup> color,<sup>80</sup> sex,<sup>81</sup> religion,<sup>82</sup> or national origin<sup>83</sup> illegal under Title VII, it did not endeavor to define the word "discrimination." This was left to the courts.

Responding to this challenge, the Supreme Court has rendered two distinctly different definitions of employment discrimination: disparate treatment (requiring proof of racial motivation)<sup>84</sup> and disparate impact (requiring no such proof).<sup>85</sup> Both concepts were defined succinctly by the Supreme Court in *International Brotherhood of Teamsters v. United States*:<sup>86</sup>

"[D]isparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, e.g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 256-266. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is

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of Perspective, 70 F.R.D. 212 (1976); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

79. See, e.g., *Slack v. Havens*, 7 FEP 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

80. Although an impermissible basis listed in § 703(a), 42 U.S.C. § 2000e-2(a) (1982), color is generally treated as indistinguishable from race. See EEOC Dec. 72-0454 (9/15/71) (unreported EEOC finding of reasonable cause where light-skinned "white-looking" Black was selected over dark-skinned, Negroid-featured Black).

81. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

82. In addition to prohibiting discrimination on the basis of religious observances, practices, and beliefs, Title VII requires employers to accommodate work requirements to religious practices. See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

83. See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

84. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

85. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

86. 431 U.S. 324 (1977).

simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States").

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-432, with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-806. See generally, B. Schlei & P. Grossman, *Employment Discrimination Law* 1-12 (1976); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co.*, and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972). Either theory may, of course, be applied to a particular set of facts.<sup>87</sup>

A minority candidate suing a law school on the basis of an anti-minority mindset theory, in which the claim is in substance one of intentional racial discrimination, would proceed under the disparate treatment definition of employment discrimination.<sup>88</sup> This being an individual case of disparate treatment rather than a class action,<sup>89</sup> proof of the requisite state of mind can be made using direct, smoking gun evidence,<sup>90</sup> which is rarely available today,<sup>91</sup> or inferentially using circumstantial evidence.<sup>92</sup> In either

87. 431 U.S. at 335, n.15.

88. See *supra* notes 67-71 and accompanying text for other reasons disparate impact discrimination would not work.

89. In a disparate treatment class action, plaintiff must establish that defendant regularly and purposefully treated his or her protected class less favorably than the dominant group, or, in other words, that disparate treatment was not an isolated act but a systemic practice. See *International Bhd. of Teamsters*, 431 U.S. 324 (1977). Such disparate treatment is normally proven by statistical evidence, see *International Bhd. of Teamsters*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); but can also be proven by testimony from numerous individuals, see *International Bhd. of Teamsters*, 431 U.S. 324 (1977); or by the adoption of broad employment practices or policies based on explicit impermissible criteria, see *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

90. See, *e.g.*, *Slack v. Havens*, 7 FEP 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

91. See, *e.g.*, *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397, 399 (D. Ore. 1970), *aff'd* 492 F.2d 292 (9th Cir. 1974).

92. Although statistics can be used under certain circumstances in individual disparate treatment cases, see Stuart Bompey & Barry Saltman, *The Role of Statistics in Employment Discrimination Litigation—A University Perspective*, 9 J. Coll. & Univ. L. 263, 271 (1981), most individual disparate treatment cases are established without the use of statistics. In *McDonnell Douglas Corp.*, 411 U.S. at 802, the Supreme Court set forth the primary non-statistical method of establishing a prima facie case based on circumstantial evidence. It must be proven:

(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied

case, defendant must be given an opportunity to rebut plaintiff's prima facie case by showing a "legitimate, nondiscriminatory reason" for plaintiff's treatment.<sup>93</sup> If defendant meets its burden of proof, plaintiff must be given an opportunity to show that defendant's reason is nothing more than a pretext for unlawful discrimination.<sup>94</sup>

In *Texas Department of Community Affairs v. Burdine*,<sup>95</sup> the Supreme Court let stand a devastating problem of proof for Title VII plaintiffs. The Court reaffirmed earlier Supreme Court rulings that defendant's burden of showing a legitimate, nondiscriminatory reason for plaintiff's treatment is only a burden of production, not one of persuasion.<sup>96</sup> In the absence of smoking gun evidence or an unsophisticated defendant, the Court's holding makes it easy for a defendant to win on the merits of a disparate treatment case. Defendant can rebut the prima facie case on the basis of admissible but untrue evidence as to its true motivation. Plaintiff, not being privy to defendant's thinking, is left with the near impossible task of persuading the trier of fact that defendant's stated motivation was untrue.<sup>97</sup> This burden is unfair when one considers that defendant is in the best possible position to know the true reasons for the action taken against plaintiff. In the law school personnel process, the minority candidate is going to be the last person to know, or have the resources to try to find out, the real reasons members of the personnel committee or tenured

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and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

93. *McDonnell Douglas Corp.*, 411 U.S. at 802.

94. *Id.* at 804-05. See also *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1451 (1987).

95. 450 U.S. 248 (1981).

96. *Id.* at 252-56. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 254-55. See also *Board of Trustees v. Sweeney*, 439 U.S. 24, 24-25 (1978) (employer's burden to dispel the adverse inference created by plaintiff's prima facie case is merely to "articulate" some legitimate, nondiscriminatory reason for the action, and not to prove the absence of discriminatory motive); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (employer's burden in rebutting prima facie case is to show that he based his decision on a legitimate consideration, and not on an illegitimate one such as race). Thus, the ultimate burden of persuasion as to the issue of discrimination always remains with the plaintiff. See generally Miguel Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 Stan. L. Rev. 1129 (1980).

97. See, e.g., *Green v. McDonnell Douglas Corp.*, 528 F.2d 1102 (8th Cir. 1976) (plaintiff fails to prove pretext).

faculty voted against him or her.<sup>98</sup> Adding the fact that courts normally allow the use of subjective reasons in articulating a "legitimate, nondiscriminatory reason" in college and university meetings,<sup>99</sup> it seems unrealistic to expect that a minority candidate will be able to prove intent.

Even if the minority candidate is able to prove the intent element of disparate treatment, he or she will also have to prove causation. Given the probability that the law school will meet its *Burdine* burden by producing more than a scintilla of evidence probative of a "legitimate, nondiscriminatory reason" for the minority candidate's treatment, the causation question will probably arise in the murky context of "mixed-motive cases."<sup>100</sup>

A mixed-motive case is one in which both permissible and impermissible factors play a role in the employer's conduct.<sup>101</sup> A typical example of a mixed-motive case is where a minority applicant is denied a job both because he or she is unqualified and the employer is racist. Though Title VII prohibits discrimination "because of" race or color, does mixed-motive discrimination constitute discrimination "because of" the applicant's race or color? Unfortunately, Title VII does not define the causal connector "because of." Also, the causation issue has not been explicitly decided by the Supreme Court, and the lower federal courts remain divided on how to resolve it. I shall begin with the statute's treatment of causation.

Although Title VII does not define the causal connector "because of," Title VII does suggest two approaches to mixed-motive cases. The first is presented in section 2000e2(a)(2), which prohibits acts that "tend to deprive" individuals of employment opportunities.<sup>102</sup> This section seems to suggest that an impermissible factor (such as racial prejudice) cannot be among the factors moti-

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98. Referring to the use of fairness as a principle on which to allocate the burden of proof, Professor Cleary has stated, "The nature of a particular element may indicate that evidence relating to it lies more within the control of one party, which suggests the fairness of allocating that element to him." Edward Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5 (1959). Thus, placing the burden of persuasion on the plaintiff regarding defendant's "legitimate, nondiscriminatory reason" is hardly compelling from a fairness perspective.

99. See, e.g., *Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 66 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981) (subjective reasons for tenure denial); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1156 (2d Cir. 1978), cert. denied, 439 U.S. 984 (1978) (reasons given for inadequate teaching ability were arguably subjective).

100. For a detailed discussion of the mixed-motive cases, see Mark Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292 (1982).

101. Thus, the mixed-motive issue in individual disparate treatment cases will normally arise at the pretext stage. See *supra* note 94 and accompanying text.

102. 42 U.S.C. §§ 2000e-2(a)(2) (1982).

vating an employer's actions. This approach to mixed-motive cases is called the "taint standard." If an employer's action is tainted by an impermissible factor (specifically, "race, color, sex, religion, or national origin"),<sup>103</sup> then it is unlawful employment discrimination under Title VII. The taint standard, also called the "discernible factor" standard (the personnel decision is unlawful if race, for example, was a discernible factor in the decision),<sup>104</sup> would seem to be consistent with the broad congressional design of Title VII—namely, "to eliminate . . . discrimination in employment based on race, color, [sex,] religion, or national origin."<sup>105</sup>

Another section of Title VII, however, suggests a different approach to causation in mixed-motive cases. Section 2000e5(g),<sup>106</sup> patterned after the National Labor Relations Act's<sup>107</sup> remedial provisions,<sup>108</sup> sets forth the type of relief a prevailing plaintiff may receive under Title VII. The last sentence reads:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.<sup>109</sup>

Although this sentence would seem to address only the question of remedy, as does all of section 2000e-5(g), the entire section resulted from the adoption of an amendment to Title VII. The amendment's purpose was to specify to a federal district court that a Title VII violation could be found only when race, color, sex, religion, or national origin was the sole motivation behind the employer's action.<sup>110</sup> This is sometimes called the "sole factor" standard—causation is established in a Title VII case only when the

103. See *supra* notes 79-83 and accompanying text.

104. See, e.g., *Bibbs v. Block*, 36 FEP 713 (8th Cir. 1984).

105. H.R. Rep. No. 914, 88th Cong., 1st Sess. 26 (1963), reprinted in [1964] U.S. Code Cong. & Ad. News 2391, 2401. See also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202-03 (1979).

106. 42 U.S.C. §§ 2000e-5(g) (1982 & Supp. I 1983).

107. 29 U.S.C. §§ 151-169 (1982).

108. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419, n.11 (1975).

109. 42 U.S.C. §§ 2000e-5(g) (1982 & Supp. I 1983).

110. Congressman Emmanuel Celler, who introduced the amendment, stated:

Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race,

employment decision is based *solely* on one of the impermissible criteria. Under the "sole factor" standard, plaintiff can never prevail in a mixed-motive case because, by definition, an impermissible criterion was not the sole factor behind the employer's action.

Federal courts have not been any more definitive than Congress in resolving the causation problem in mixed-motive individual disparate treatment cases.<sup>111</sup> In *McDonnell Douglas Corp. v. Green*,<sup>112</sup> the Supreme Court seemed to adopt the taint standard suggested in section 2000e-2(a)(2).<sup>113</sup> The Court stated that, "In the implementation of . . . [personnel] decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."<sup>114</sup> In *McDonald v. Santa Fe Trail Transportation Co.*,<sup>115</sup> the Supreme Court suggested that the proper causation standard may be somewhere between the liberal taint standard and the stricter sole factor standard. Responding to plaintiff's claim that the employer's "legitimate, nondiscriminatory reason" offered for their discharge was mere pretext,<sup>116</sup> the Court said:

The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies. . . . [N]o more is required to be shown than that race was a "but for" cause.<sup>117</sup>

*McDonald* thus adopts a "but-for" causation standard. Title VII is violated when plaintiff shows that but for the use of an impermissible criterion (race, color, sex, and so on), the adverse personnel decision would not have been made. The but-for standard is sometimes called either the "dominant taint," "dominant factor," or "determining factor" standard (the personnel decision is unlawful if race, for example, was the dominant or determining factor in the decision)<sup>118</sup> or the "same decision" standard,<sup>119</sup> "which would uphold personnel action based in part on race if

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color, religion, or national origin. That is the purpose of this amendment.

110 Cong. Rec. 2567 (1964).

111. For a discussion of causation in systemic disparate treatment cases, see, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977).

112. 411 U.S. 792 (1973).

113. See *supra* note 102 and accompanying text.

114. 411 U.S. at 801.

115. 427 U.S. at 273 (1976).

116. See *supra* text accompanying note 94.

117. 427 U.S. at 282, n.10.

118. See, e.g., *Bibbs v. Block*, 36 FEP 713 (8th Cir. 1984).

119. *Id.*

merit principles alone would have led to the same result."<sup>120</sup>

Like the Supreme Court and Congress, the lower federal courts have not agreed on a causation standard. They seem to be split between the taint and but-for standards.<sup>121</sup> One scholar, however, has concluded that the lower federal courts are moving toward stricter standards of causation.<sup>122</sup>

In short, assuming the defendant law school is able to meet its burden of protection under *Burdine*,<sup>123</sup> the success of the minority plaintiff's anti-minority mindset action may depend on which causation standard the court applies. Plaintiff will have an easier time establishing a Title VII violation in jurisdictions employing the taint standard than in jurisdictions employing the stricter but-for or sole factor standards.<sup>124</sup>

## Conclusion

Minority law professors have sensed for some time that something is amok in United States law schools when it comes to hiring, promoting, and granting tenure to minority candidates. The statistics, as dismal as they are,<sup>125</sup> do not tell the entire story. They do not tell us, for example, how many potential minority candidates have not applied for teaching positions because of the reputation of United States law schools for hostility toward minority candidates, or why minority candidates do so badly in the personnel process.

By broaching the notion of an anti-minority mindset, I have attempted to provide an answer to this question, although not by any means the only answer. There are simply too many minority candidates with qualifications too similar to many white male candidates who do not do as well as the latter for one to seriously suggest that the dearth of minority law professors, especially tenured minority law professors, is entirely due to a lack of qualifications. Nor can one say that in every case the problem is simply one of Jim-Crow style racism. There is more to the problem than these now-traditional explanations, and law schools must look for new insights if they sincerely hope to deal effectively with the problem

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120. Brodin, *supra* note 100, at 296.

121. See *id.* at 308-10 (cases collected). See also Bibbs v. Block, 36 FEP 713 (8th Cir. 1984).

122. See Brodin, *supra* note 100.

123. See *supra* notes 94-99 and accompanying text.

124. This assumes, of course, that plaintiff is able to show that an anti-minority mindset is in substance racial prejudice. See *supra* notes 23-66 and accompanying text.

125. See *supra* notes 8-9 and accompanying text.

and its adverse effects on the quality of legal education.<sup>126</sup>

If part of the problem is engendered by an anti-minority mindset among some white law professors who are verbally aggressive and, by appealing to merit principles, forceful enough to persuade their colleagues to reject minority candidates, then, unfortunately, minority candidates or tenured minority law professors have limited choices. Litigation is doubtful at best. Verbal confrontation at faculty meetings, which will surely shorten the life of the lone and stressed-out tenured minority faculty member,<sup>127</sup> may be the only realistic way to contain white law professors who seem habitually hostile to minority candidates, and who attempt to hide their true intentions behind a smoke screen of meritocracy.

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126. See *supra* notes 40-43 and accompanying text.

127. The late C. Clyde Ferguson's over-burdened professional life is typical of many minority law professors. See *In Memoriam: C. Clyde Ferguson, Jr.*, 97 Harv. L. Rev. 1253, 1264-67 (1984).



